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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALFRED CARL FELIZ, Defendant and Appellant.	F071704 (Super. Ct. No. BF148574B) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Manuel J. Baglanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Eric L. Christoffersen, and Christopher J. Rench, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Alfred Carl Feliz was charged with attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664 [count 1]); kidnapping (§ 207, subd. (a) [count 2]); assault with a semiautomatic firearm (§ 245, subd. (b) [count 3]); gang participation (§ 186.22, subd. (a) [count 5]); and possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 8]).[2] The information further alleged the attempted murder was willful, deliberate, and premeditated, perpetrated during the commission of a kidnapping, and/or perpetrated by means of discharging a firearm from a motor vehicle at another person outside of the vehicle (§ 189); in connection with counts 1 and 2, defendant discharged a firearm and proximately caused great bodily injury (§ 12022.53, subd. (d)); in connection with counts 3, 5, and 8, he used a firearm (§ 12022.5, subd. (a)) and inflicted great bodily injury (§ 12022.7); he committed the offenses underlying counts 1 through 3 and 8 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); and, as to all counts, he was previously convicted of a qualifying "strike" offense (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), was previously convicted of a serious felony (§ 667, subd. (a)), and previously served three separate prison terms (§ 667.5, subd. (b)).

Following a trial, the jury found defendant guilty as charged on counts 1, 2, 5, and 8 and convicted him of the lesser included offense of assault with a firearm (§ 245, subd. (a)(2)) on count 3. It also found true the special allegations not related to his prior

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[1] Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

[2] Codefendant Anthony Victor Ochoa was charged with attempted murder (§§ 187, subd. (a), 664 [count 1]); kidnapping (§ 207, subd. (a) [count 2]); assault with a semiautomatic firearm (§ 245, subd. (b) [count 3]); assault with a firearm (*id.*, subd. (a)(2) [count 4]); gang participation (§ 186.22, subd. (a) [count 5]); obstructing or resisting executive officers in performance of their duties (§ 69 [count 6]); driving in willful or wanton disregard for safety of persons or property while fleeing from pursuing police officers (Veh. Code, § 2800.2 [count 7]); and possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 8]). Ochoa was not jointly tried with defendant and is not a party to this appeal.

convictions. In a bifurcated proceeding, the trial court found true the special allegations related to the prior convictions. Defendant was sentenced to 30 years to life, plus 25 years to life for firearm discharge proximately causing great bodily injury, five years for the prior serious felony conviction, and two years for two prior prison terms,[3] on count 1. Execution of punishment on counts 2, 3, 5, and 8 was stayed pursuant to section 654.

On appeal, defendant presents numerous contentions, which we sort into two categories. The first is comprised of the following non-gang-related arguments: (1) the trial court erroneously refused to instruct the jury on attempted voluntary manslaughter; (2) defense counsel rendered ineffective assistance by failing to request instructions pertaining to voluntary intoxication; (3) the court erroneously overruled defense counsel's objection to a prosecution witness's remark that a kidnapping occurred; (4) the evidence did not establish defendant discharged a firearm from a motor vehicle at another person outside of the vehicle; and (5) in view of a recent amendment to section 12022.53, enacted by Senate Bill No. 620 (Stats. 2017, ch. 682, § 2) and effective January 1, 2018, the matter should be remanded for reconsideration of sentencing.[4]

The second category is comprised of the following gang-related arguments: (1) in the absence of *Miranda*[5] warnings, defendant's responses to booking questions about his gang affiliation were inadmissible; (2) the gang expert improperly related case-specific testimonial hearsay in violation of *Crawford v. Washington* (2004) 541 U.S. 36

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3 Because the prior serious felony allegation and the third prior prison term allegation concerned the same offense, the court did not impose an enhancement for the latter. (See *People v. Perez* (2011) 195 Cal.App.4th 801, 805.)

4 In his opening brief, defendant comments in passing that the evidence did not establish the attempted murder was willful, deliberate, and premeditated. He fails to state the point under a separate heading or subheading. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Schnabel* (2007) 150 Cal.App.4th 83, 84, fn. 1.) Consequently, we need not address this claim. (*People v. Schnabel*, *supra*, 150 Cal.App.4th at p. 84, fn. 1; *People v. Wallace* (2004) 123 Cal.App.4th 144, 151, fn. 7.)

5 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

(*Crawford*) and *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*); (3) the evidence did not establish defendant and the individuals who committed the predicate offenses (see at p. 54, *post*) belonged to the same gang, as required pursuant to *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*); (4) the evidence did not support the gang participation conviction; and (5) the evidence did not support the gang enhancements. The Attorney General contends defendant forfeited his *Crawford*/*Sanchez* claim.

With regard to defendant's non-gang-related arguments, we conclude:

The trial court had no obligation to instruct the jury on attempted voluntary manslaughter because there was no substantial evidence justifying such an instruction;

Defendant's ineffective-assistance-of-counsel claim must be rejected because the appellate record does not reveal why defense counsel did not request voluntary intoxication instructions;

The trial court's refusal to sustain the objection to a prosecution witness's remark that a kidnapping occurred did not constitute prejudicial error because the evidence demonstrated a kidnapping did in fact occur;

Substantial evidence established defendant discharged a firearm from a motor vehicle at another person outside of the vehicle; and

In light of the trial court's comments during sentencing, which indicated it would not have stricken the section 12022.53, subdivision (d), enhancement in any event, a remand for reconsideration of this enhancement is unnecessary.

With regard to defendant's gang-related arguments, we conclude:

Admission of defendant's responses to booking questions about his gang affiliation did not constitute prejudicial error because other evidence demonstrated his gang affiliation;

Defendant preserved his *Crawford*/*Sanchez* claim for appeal by filing an appropriate motion in limine;

Admission of the gang expert's testimony concerning the commission of two or more qualifying predicate offenses by gang members—which conveyed case-specific testimonial hearsay in violation of *Crawford* and *Sanchez*—did not constitute prejudicial error because certain offenses charged against defendant and Ochoa in the instant case qualified as predicate offenses; and

Substantial evidence established *Prunty*'s "sameness" requirement, supported the gang participation conviction, and supported the gang enhancements.

Accordingly, we affirm the judgment.

STATEMENT OF FACTS

I. Prosecution's case-in-chief.

a. *The victim.*

Miguel A., also known as "Mikeio," who was 50 years old at the time of trial, joined the Lomita Bakers, a Sureño subset in East Bakersfield, when he was 13 years old. In 1983, while in county jail, he befriended Gerald Feliz, also known as "Tinker," a future member of the Sureños. In the early 1990's, Miguel became a validated member of the Mexican Mafia, the prison gang that "issue[s] [violent] orders" to Sureños. In or around 2003, however, he disassociated from both gangs.

Miguel subsequently became a confidential informant. In 2005, while in prison, he helped the Ventura County District Attorney's Office obtain incriminating statements from the suspects in a triple homicide case, resulting in their convictions. In exchange, his sentence was reduced. In 2010, Miguel met defendant, a Mexican Mafia associate and Gerald's[6] nephew. That same year, Miguel provided information to the Kern County Sheriff's Office that led to defendant's arrest. In exchange, Miguel received $200.

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[6] To avoid confusion, we identify individuals who share defendant's surname by their given name.

Following the events of May 20, 2013 (see at pp. 6-7, *post*), the Kern County District Attorney's Office relocated Miguel.

At trial, Miguel testified the Mexican Mafia and Sureños have a rule against "snitching," i.e., cooperating with law enforcement. The penalty for violating this rule is death. Miguel identified other Sureño subsets in Kern County, including the Colonia Bakers, Loma Bakers, Oakie Bakers, and Varrio Bakers. He also mentioned he had lived in the same apartment complex as defendant's cousin "Kuico."

b. *The shooting*.

On the evening on May 20, 2013, Miguel and his daughters were at a friend's residence near the intersection of Mount Vernon Avenue and Pacific Street when defendant pulled up in a green Chrysler Sebring. Defendant pointed a handgun at Miguel, "waved [him] over," and "told [him] to get in the car" to talk. Miguel, who did not want a shooting to erupt in front of his daughters, entered the car and sat in the front passenger seat. Before driving off, defendant handed the firearm to Ochoa (see *ante*, fn. 2), also known as "Bouncer," who was in the backseat.

During the ride, which lasted between 15 and 25 minutes, defendant accused Miguel of helping the police arrest him in 2010 for "possession or something to that effect," for which he served "[a] couple years," and "ratting on" "big homies" in the Mexican Mafia in connection with "some homicides" in Ventura and Oxnard. He was "upset that he was convicted" and "blamed [Miguel]." Miguel thought defendant was "high" on crystal methamphetamine. Because defendant "was already in an agitated state," Miguel did not want to "precipitate any events . . . with him." Miguel never admitted he had cooperated with law enforcement. He believed defendant "might [have] do[ne] something to [him] if [he] admitted to it."

The Sebring stopped at the intersection of Mount Vernon Avenue/Alfred Harrell Highway and Panorama Drive. Miguel, who recognized the area was "[d]eserted," decided to escape. He grabbed the door handle, but "[it] slipped out of [his] hand."

Defendant yelled, "He is trying to bolt[!]" Miguel opened the door on his second attempt. As he was exiting the car, he looked back and saw Ochoa handing defendant the gun. When Miguel faced forward, he "got shot in the back." He glanced behind once more and saw defendant trying to fire again. However, "the gun locked up." Defendant "peel[ed] out" eastbound on Panorama Drive. Miguel testified he was outside the Sebring when he was shot.

Miguel went to a nearby convenience store and asked the cashier to phone 911. Officer Pair of the Bakersfield Police Department was dispatched to the store. Miguel told Pair he had been shot by defendant. After Pair displayed defendant's mug shot on a laptop, Miguel confirmed defendant was the gunman. Miguel was transported to Kern Medical Center, where he was treated for a right rib fracture and collapsed lung. Surgical staff did not extract the bullet because it was not "in a space where it's going to cause . . . further harm" and "the additional trauma doing surgery to remove a projectile" was unwarranted. At some point, Miguel was shown an array of six photographs. The array included a photograph of Ochoa. Miguel identified Ochoa as the other passenger in the Sebring.

At trial, Pair testified he observed "little black pinpricks around [Miguel's] wound channel that appeared . . . to be consistent with stippling.[7]" According to Pair, pertinent literature specified "the optimal range for [stippling] to occur is . . . [six] to 30 inches."

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7 Pair defined "stippling":

> "Stippling would be when you fire a gun, there's gunpowder. It would be the unburnt gunpowder and other debris in the barrel. So if you had dirt or sand or whatever in the barrel, it gets fired out of the barrel with the bullet. So if you're a close distance, that will create impacts on the point of contact, and if that's human skin, it almost has, like, a little tattooing effect, and if it's actual gunpowder, it will create black little pinpricks all over."

c. *Arrests*.

On May 20, 2013, between 7:15 p.m. and 7:45 p.m., Bakersfield police officers searched for defendant at his address of record on Milvia Street. Bystanders in front of the residence stated defendant "was not home currently." As the officers were leaving, they saw Ochoa driving toward them in the Sebring. When they attempted to pull him over, he "sped away." A high-speed pursuit ensued. After Ochoa passed the intersection of Palm Drive and Oregon Street, he abandoned the car and fled on foot. He was eventually captured and brought to Kern Medical Center, where he was identified by Miguel.

On May 23, 2013, Kern County Sheriff's deputies Magaña and Bravo were near the intersection of West Drive and Pacific Street when they spotted defendant walking eastbound on Pacific Street. When they approached him, defendant entered a nearby trailer park. Within 10 minutes, sheriff deputies and police officers set up a perimeter and evacuated the residents. Adolf Feliz, defendant's father, was one of these residents. Adolf told Magaña that defendant was in his trailer. After defendant refused to obey commands to leave the trailer, the sheriff's office SWAT team subdued him with tear gas. Following defendant's arrest, Adolf approached Bravo and stated he was "Adolf from East Side Loma."

d. *The Sebring and its owner*.

The sheriff's office impounded the Sebring. Bravo searched the vehicle and found a cell phone containing photos of defendant and Gerald. Latent fingerprints lifted from the passenger-side front windshield's exterior matched Miguel's fingerprints. Latent fingerprints lifted from the exterior of the passenger side windows matched Ochoa's fingerprints.

On May 23, 2013, Jessica B., the owner of the Sebring, appeared at the sheriff's headquarters to retrieve her vehicle. Her cell phone, which was confiscated as part of the investigation, contained numerous text messages referring to someone named "Al" or

"Alf";[8] Ochoa's contact information; and the contact information of various Colonia Bakers and Loma Bakers.[9]

On the evening of August 7, 2013, Magaña conducted a probation search of Jessica's residence and found two letters in an envelope. The first letter was addressed to "Acer" and instructed the individual to "send the [second letter] to A."[10] The second letter was addressed to "A." At trial, Magaña opined defendant was the intended recipient of the second letter:

> "This [letter] addressed to A. That's significant because . . . [it's] [defendant's] first initial of his first name. Information towards the middle of this letter . . . says 'I heard midget ass was supposed to get a lawyer for you and let me just tell you, he's lagging on that.'
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> ". . . I'm familiar with the full investigation and the phone calls and everything that has gone on and in reading this letter, like I said, the A is significant, the getting this person a lawyer is significant to me, and then when you go down here to . . . 'what happened with your homie,' in Spanish, '*el pendejo me puso en sus pendejadas*,[']which means what happened to your homie? The idiot put me in his mess, his shit . . . . You have [Jessica] writing a letter to [defendant] regarding a lawyer and then expressing how his homie, Ochoa, who during his interview gave out her name regarding the car that he was in and how he dropped her off at Probation and now here you have a letter where she is . . . exclaiming to [defendant], 'your homie, what's up with your homie? He put me in the mix, in his shit, in his issues, his situation.' "

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8 These text messages include "where . . . r . . . u . . . Alf"; "that message was for Al"; and "hey, if Al shows up, have him call me." Bravo testified he was "aware . . . [defendant] refers to himself and other people, associates, and family members . . . will refer to him as Al or Alf."

9 Bravo testified he "had contact with and kn[e]w . . . to be gang members of different gangs . . . in Kern County" the "[individuals] [Jessica] . . . listed on basically all her contacts" "through other investigations."

10 Magaña testified a Colonia Baker member named Arthur Medina had the moniker "Acer."

At trial, Jessica testified she loaned the Sebring to a friend named Jose on May 20, 2013. She denied lending the Sebring to Ochoa, someone she "knew of" but "never actually got introduced to." Jessica testified she only "kn[e]w of" defendant, her former girlfriend's cousin. However, she conceded she wrote the letters Magaña found during the August 7, 2013, probation search.

e. *Jail calls.*

On May 24, 2013, at 1:07 a.m., defendant phoned C.M., also known as "Moody." The following exchange transpired:

"[Defendant]: They just brought me from headquarters right now. They took me headquarters. Hey, I think it's all bad with your boy, though. . . . [¶] . . . [¶]

"[C.M.]: Who?

"[Defendant]: My Crime[y]. Huh? They . . . put a keep away on him . . . and everything already. [¶] . . . [¶]

"[C.M.]: . . . [W]hy did you leave? Why did you jump in the car and meet with them?

"[Defendant]: 'Cause went and got my thing. I told you what I was doing. . . . [¶] . . . [¶] . . . I got a strap fool. [¶] . . . [¶] . . . It's gonna be for something business, fool, I told you that.

"[C.M.]: That's why . . . I been acting the way I have 'cause you keep lying to me.

"[Defendant]: . . . [Y]ou know I'm with (Gangster) and you . . . [¶] . . . [¶] . . . think I'm with somebody else, I'm with (Gangster). [¶] . . . [¶]

"[C.M.]: . . . I asked you, 'Have you ever been with that girl?' And you said, 'No.'

"[Defendant]: With who?

"[C.M.]: That (unintelligible) like fuckin', uh, the owner of the car. [¶] . . . [¶]

"[Defendant]:	(Moody), uh, that's my home girl, fool.
"[C.M.]:	No, you've been with her.
"[Defendant]:	That's my home girl, fool.
"[C.M.]:	You ever been with her?
"[Defendant]:	No, that's my home girl.
"[C.M.]:	Okay then. Whatever. [¶] . . . [¶]
"[Defendant]:	. . . They took pictures of me right now and everything. They usually don't take pictures . . . . And then he asked me if I had . . . ties to that (one word).
"[C.M.]:	Huh?
"[Defendant]:	He asked me if I had ties with that (one word), remember?
"[C.M.]:	Yeah.
"[Defendant]:	Man, I don't know what the heck you talkin' about. Man. [¶] . . . [¶]
"[C.M.]:	I miss you.
"[Defendant]:	I miss you, too, baby. [¶] . . . [¶]
"[C.M.]:	I . . . wanna be in your arms.
"[Defendant]:	I wanna be in yours, too, baby. . . . [¶] . . . [¶] . . . I love you.
"[C.M.]:	I love you, too.
"[Defendant]:	You gonna be there for me?
"[C.M.]:	Yeah.
"[Defendant]:	Hm, fuckin' love you though, (Moody).
"[C.M.]:	I love you, too.
"[Defendant]:	You know I fuckin' love you, fool. [¶] . . . [¶]

"[C.M.]: They won't . . . let nobody on the premises . . . . [¶] . . . [¶] . . . For five days.

"[Defendant]: For five days?

"[C.M.]: Mm-hm.

"[Defendant]: Wonder why?

"[C.M.]: 'Cause of the tear gas.

"[Defendant]: Is that right? Damn they evacuated the whole shit like that. . . . I seen it – I can't get the newspaper she didn't save it for me. I wanna see what it says. . . . Hey?

"[C.M.]: Yeah?

"[Defendant]: Can you get it and cut it out and send it to me 'cause I wanna see what it says.

"[C.M.]: The what?

"[Defendant]: The newspaper.

"[C.M.]: Okay.

"[Defendant]: For my incident, can you get it, like, cut it out? I wanna see what it says . . . . [¶] . . . [¶]

"[C.M.]: Yeah.

"[Defendant]: 'Cause all that shit is valuable information you know what it says. . . . [¶] . . . [¶] . . . I love you.

"[C.M.]: I love you."

Bravo, who was familiar with defendant's voice, listened to a recording of defendant's phone call to C.M. He testified:

> "[Defendant] referred to . . . Ochoa as his crimey. He denied knowing who . . . Ochoa was, and then the statements supported my opinion that he knew who . . . Ochoa was. [¶] . . . [¶] . . . [Defendant] making reference to him going and getting his thing, 'my thing,' then he clarifies it with the follow-up statement, 'I got my strap.' 'Strap' means street slang for a firearm. [¶] . . . [¶] . . . [H]e's telling [C.M.] the reason he left and the reason he

was gone had to do something with business, business being gang activity. [¶] . . . [¶]

". . . There's a word, I believe, in the transcript that says . . . unintelligible, but it's actually the Spanish word 'hyna' . . . . That word is Spanish for girl or lady in the context of she's my hyna. She's my lady. [C.M.] is questioning [defendant] about this hyna, the car, . . . based on what I understood at the time of the case, she's questioning [defendant] about his relationship with Jessica . . . , whether it was a dating/romantic relationship. And, in my opinion, she is upset and was questioning if he had been with her in the context of a sexual relationship with Jessica . . . . [¶] . . . [¶]

". . . Southern Hispanic gang members are never to mention Mexican Mafia or any words that are associated with the Mexican Mafia, such as the Black Hand or the Eme. [¶] . . . I knew [defendant] was an associate of the Mexican Mafia. This case involved and, in my opinion, was for the Mexican Mafia, and the fact that he said the one word. Eme is just one word. And he is making these references to [C.M.] so she understands what they were questioning [him] about at the time of his arrest or shortly after his arrest. [¶] . . . [¶]

". . . Along with the newspaper clippings, the tone in this call and in other calls that I listened to, in my opinion, [defendant] is bragging about that it required a SWAT team and the shutting down of the neighborhood to effect his arrest. [¶] But more specifically about the newspaper clippings, I know gang members will often keep and maintain newspaper clippings of the crimes they commit that appear in the media or publication to show their exploits and brag about their exploits to other members – other gang members. [¶] . . . [¶]

". . . The other thing that was significant about this phone call and the phone calls specifically regarding females . . . is this: Southern Hispanic gang members could not function without the control, the manipulation of females. Female associates are the lifeline of gang members. Gang members will be isolated once they are in custody from other gang members and the activities of the gang without having control, having the ability to control women and have them perform functions for them in a custody setting. . . . [¶] And listening to this phone call and other phone calls involving [defendant] and his female associates, it showed what he did to maintain control of these women."

On May 24, 2013, at 1:57 a.m., defendant phoned his sister C.F. The following exchange transpired:

"[Defendant]: . . . [I]f you see Tinker around there, tell that mother fucker I said he's going to make sure that mother fucker don't show.

"[C.F.]: Yeah.

"[Defendant]: Alright?

"[C.F.]: Yeah, yeah. [¶] . . . [¶]

"[Defendant]: Did they say my name on the news?

"[C.F.]: Yeah, fool. . . . [¶] . . . [¶]

"[Defendant]: That shit going to be in the front page, you know that right? [¶] . . . [¶] . . . It's going to be in the front page right now when they pass out the paper. [¶] . . . [¶]

"[C.F.]: Yeah, that shit was on the news, I don't see why not. [¶] . . . [¶]

"[Defendant]: They . . . said they can't go back to the (Unintelligible) for like five days[.] [¶] . . . [¶] . . . Because of the tear gas.

"[C.F.]: Oh yeah, yeah."

Bravo listened to a recording of defendant's phone call to C.F. and testified:

"[Defendant] wanted [C.F.] to relay a message for him to [Gerald] that, quote, that mother fucker better not show up. [¶] . . . [¶] . . . In my opinion, based on what I had learned at that point in the investigation, [Gerald], along with [defendant], were attempting to locate Miguel . . . to dissuade or prevent him from cooperating with this investigation and his prosecution. [¶] . . . [¶]

". . . [T]he tone of the . . . conversation where [defendant] is speaking with his sister and he is, in my opinion, bragging or boasting about his arrest, it is going to be appearing in the news, that it requires the SWAT team. That amount of law enforcement that are required to effect his capture and arrest, it is also in this conversation."

On May 24, 2013, at 10:20 a.m., defendant spoke with Gerald. The following exchange transpired:

"[Gerald]: Where's the phone that uh, I lend you?

"[Defendant]: That . . . got confiscated.

"[Gerald]: Oh, alright then. Check it out, um,

"[Defendant]: That got confiscated, Jessica's phone got confiscated and a lot of other stuff.

"[Gerald]: Ok.

"[Defendant]: But, I think they're going to drag her into this case, Jessica.

"[Gerald]: Yeah.

"[Defendant]: Yeah, because they . . . mentioned her last night, like oh yeah and Jessica, what do . . . you know[,] to look good, I said I don't know nobody, I don't know who the hell it is, you know.

"[Gerald]: Yeah. [¶] . . . [¶]

"[Defendant]: You . . . know straight off (Unintelligible) where (Unintelligible) lives at right?

"[Gerald]: Huh?

"[Defendant]: That corner house?

"[Gerald]: K[uico].

"[Defendant]: No, you know where he lives at, right? On Pacific.

"[Gerald]: Who? . . .

"[Defendant]: . . . K[uico].

"[Gerald]: Yeah.

"[Defendant]: Ok, you know that, all the way around the corner, that corner house.

"[Gerald]: Yeah. [¶] . . . [¶]

"[Defendant]: That's where he was at.

"[Gerald]: Oh is that right?

"[Defendant]: Yeah, . . . that's where old boy was at.

"[Gerald]: Alright then. That's cool then, 'cuz uh, that'll work then."

Bravo listened to a recording of defendant's conversation with Gerald and testified:

> "A number of things in that phone call that I determined to be significant in this investigation beginning with a cellular phone that's discussed between [Gerald] and [defendant]. In the conversation [Gerald] asked [defendant] what happened to the phone. [Defendant] tells [Gerald] that phone was confiscated along with Jessica['s] . . . cell phone, which was also seized. At the time of the phone call, the vehicle, the Chrysler Sebring had already been in our custody . . . . The cell phone in the vehicle had already been seized by the sheriff's office and based on that and [Gerald] asking him what happened to the phone I lent you and what I had discovered about [Gerald] having access to that phone in the Chrysler Sebring and using it, in my opinion, that was what [Gerald] was referring to about the phone. And in my opinion, . . . when [defendant] is telling him it's confiscated, I believe they are referring to the same phone, the phone that was found in the Chrysler Sebring . . . . [¶] . . . [¶]
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> ". . . The other thing that was significant was a portion of the conversation between [defendant] and [Gerald] where they are discussing getting at Ol[d] Boy and where he picked him up from. . . . [Miguel] testified that there was a relative named [Kuico] who lived at or near his apartment complex. In the conversation, [defendant] is describing where they picked him up from was at or near where [Kuico] lives. It was also significant to me that he is describing to Gerald . . . where . . . [Miguel] was living at the time on this phone call. In my opinion, he was requesting Gerald . . . to make contact with Miguel . . . to dissuade him in some fashion from participating in this criminal investigation and then ultimately the prosecution of this case."

On May 24, 2013, at 12:05 p.m., defendant phoned Jessica. The following exchange transpired:

"[Defendant]: You were looking at my charges?

"JESSICA[:] Yeah.

"[Defendant]: On the computer?

"JESSICA[:] Yeah. [¶] . . . [¶] . . . And . . . your buddy, . . . I guess he have court today right or no?

"[Defendant]: I don't know. [¶] . . . [¶]

"JESSICA[:] . . . [R]ight now on the thing, the way it looks . . . on the computer, everything's gotten a lot better for him.

"[Defendant]: Mm-hm.

"JESSICA[:] You know what I mean?

"[Defendant]: Yeah.

"JESSICA[:] Like he doesn't have really nothing . . . [,] they dropped a lot of . . . the charges. . . . [¶] . . . [¶]

"[Defendant]: And that's (Bouncer) right?

"JESSICA[:] Yep. It . . .

"[Defendant]: Well, how . . .

"JESSICA[:] (Unintelligible), okay let me make sure . . . (Ochoa[,] Anthony Victor), right?

"[Defendant]: Yeah."

Sheriff's deputy Sanchez listened to a recording of defendant's phone call to Jessica. He was familiar with defendant's and Jessica's voices, having contacted the two of them in person over the course of the criminal investigation. Sanchez testified:

> "The most significant part about this call was that . . . [defendant] identifies his partner in crime by his moniker, and then Jessica . . . identifies him by his full name while she is accessing the public record regarding the arrest and charges of . . . Ochoa."

On May 31, 2013, at 6:00 p.m., defendant phoned Gilbert Velasquez, also known as "Gangster." The following exchange transpired:

"[Defendant]: Remember that day?

"[Velasquez]: Yeah.

"[Defendant]: They were following us for like 5 minutes they said.

"[Velasquez]: Did they really? [¶] . . . [¶]

"[Defendant]: . . . It's what they told me fool, they were following us for like 5 minutes.

"[Velasquez]: Serious? [¶] . . . [¶]

"[Defendant]: Hey, hey you know the vato [Vago]?

"[Velasquez]: Who?

"[Defendant]: (Vago) from the Loma?

"[Velasquez]: No.

"[Defendant]: Get, get at that fool and (ya sabe) he knows what's up fool.

"[Velasquez]: Vago, where's he at?

"[Defendant]: Uh, . . . Moody knows how to get ahold of him.

"[Velasquez]: Ok."

Sanchez listened to a recording of the May 31, 2013, phone call and testified:

> "[Defendant] had a discussion with Gangster . . . . And I know that is . . . Velasquez because . . . I recognize his voice and I've had contact with him. They have a discussion regarding the day that [defendant] was arrested. He tells him that he was with him, that he was with him in his truck, that we were observing him for about five minutes when it all happened.
>
> "And there is mention of getting ahold of a subject by a . . . gang moniker of Vago from the Loma, and he tells . . . Velasquez that Moody, who is [C.M.], knows how to get ahold of him."

On July 4, 2013, at 10:51 a.m., defendant spoke with Gerald. The following exchange transpired:

"[Gerald]: What's up? [¶] . . . [¶]

"[Defendant]: . . . [H]ave you guys talked to Sandra?

"[Gerald]: Sandra?

"[Defendant]: Yeah, 'cuz I told Sandra to go whip that pussy on him.

"[Gerald]: (Unintelligible).

"[Defendant]: I told Sandra to go give him some pussy."

Sanchez listened to a recording of the July 4, 2013, phone call and testified:

"[Defendant] . . . mentions a female by the name of Sandra, . . . who apparently he has contacted and told her to locate a subject who I believe is Miguel . . . and provide sexual services to him. [¶] . . . [¶]

". . . I believe it's a tactic to try to get [Miguel] to change his mind. The other tactics didn't appear to be working. So he is going to try a different tactic to get him to not show up to court."

f. *Visitation call*.

On May 25, 2013, at 12:46 p.m., C.M. visited defendant in jail. The following exchange transpired:

"[Defendant]: . . . His family was there. They seen that. The people, uh, that lives off Pacific and Mount Vernon, you know, the corner house.

"[C.M.]: Yeah.

"[Defendant]: . . . [T]he girl you don't like, the little short one that say she's puppet's fucking girl. [¶] . . . [¶]

"[C.M.]: On Pacific and what?

"[Defendant]: That go to my dad's house.

"[C.M.]: Oh yeah, yeah, yeah.

"[Defendant]: Yeah. Well she – that's who she was talking to Miguel. Huh?

"[C.M.]: Miguel?

"[Defendant]: Yeah, tell the bitch shut up. Tell (unintelligible).

"[C.M.]: Go to court? Oh no.

"[Defendant]: He better not go. He better not go.

"[C.M.]: Oh you – I get it – okay. [¶] . . . [¶]

"[Defendant]: . . . 'Cause they actually need a witness to testify and (there's not none). The only one is – the one they say that they got now but I don't know about that shit. . . . [¶] . . . [¶] . . . You know where Pacific and Mount Vernon is at? The corner house on the left – if I'm going down Pacific going toward Mount Vernon, it's the one on the left hand side.

"[C.M.]: (White)?

"[Defendant]: White. With a garage right there. That's where she lives at. . . . [T]hat's the lady that goes to my dad's house. [¶] . . . [¶] . . . She . . . tell me she knows where to find him if she knows where he's at. He's at her house. You know where his daughter lives at?

"[C.M.]: Last time . . . I seen him, he's in the garage right there . . . . [¶] . . . [¶] . . . [H]e right there[,] that little garage, those apartment. That's where he stays at. [¶] . . . [¶]

"[Defendant]: Okay, cause Tinker, he's looking for him.

"[C.M.]: Oh.

"[Defendant]: He's looking for him. So, uh, I don't know who [h]is daughter is. You know who [h]is daughter is?

"[C.M.]: I can find out. Isn't he from (unintelligible) find out.

"[Defendant]: 'Cause his daughter stays right there too. But the daughter stays in the Grandma's house. You know who knows his daughter. Uh, (the other lady that goes) to my dad's house.

"[C.M.]: Who?

"[Defendant]: . . . That dyke. The short hair.

"[C.M.]: Uh-huh.

"[Defendant]: She knows his daughter. [¶] . . . [¶] . . . I know they don't have me. I feel it in my heart, fool. They ain't got nothing, fool. . . . [¶] . . . [¶] . . . I go to my court (unintelligible) but as long as he don't go to any of them. Hey, as long as he don't go to any of them – because . . . as time goes on they're gonna need him to testify.

"[C.M.]: He's not gonna testify."

Sanchez listened to a recording of the visitation and testified:

"[Defendant] was familiar with where [the events of May 20, 2013,] occurred. . . . [¶] . . . [¶] . . . He mentions that the family was there, the people who live on the corner of Pacific and M[oun]t[] Vernon. [¶] . . . [¶] . . . [H]e mentions the first name of the victim, Miguel. [¶] . . . [¶] . . . [Gerald] . . . was mentioned. . . . [¶] . . . [¶]

". . . [Defendant] has a conversation with [C.M.] about a girl at the corner. I believe they are discussing the whereabouts of Miguel[']s . . . daughter. [¶] And then he also discusses . . . that witnesses are needed to testify against him and that the only witness is Miguel . . . .

"He also mentions a girl that lives on the corner house. . . . He refers to her as a d[y]ke and says that she knows who the female is, the female in question, which is . . . [Miguel]'s daughter. [¶] . . . [¶]

". . . [Defendant] acknowledges that [Gerald] is looking for him. And . . . when they refer to 'him,' I believe it's the victim, Miguel . . . ."

g. *Correspondence.*

On July 30, 2013, Sanchez conducted a probation search of Velasquez's residence. He found a letter dated July 18, 2013, sent by defendant. In the letter, defendant noted "Mike[i]o" was in witness protection. He mentioned "Señor Chavo" "wants him to take care of the facility" and "Bouncer of Colonia" "is assisting him in running one of the pods[11] at Lerdo." Defendant also referred to "Señor Pisque," "Lil' Man," and "Chuco." He signed the letter "camarada."

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11 Sanchez testified a pod is "[a] section where inmates are housed."

Based on his "training and experience," Sanchez knew a Mexican Mafia member named Raymond Perez had the moniker "Mr. Chavo." He further testified at trial:

> "[In the letter,] [t]here's references to members of the Mexican Mafia. There's also a comment about the victim, in this case, Miguel . . . , being on a Witness Protection Program . . . . [¶] . . . [¶] . . . [I]t is significant to me [that] he mentions the moniker of the victim in this case, who is known by the moniker of Mikeio. Again, that's Miguel . . . ."

> "During his letter, [defendant] . . . states that . . . Se[ñ]or Chavo wants him to take care of the facility, which is the Lerdo facility that he was in custody at the time. [¶] . . . [¶] . . . It's significant because . . . [defendant] is claiming that he is an associate of the Mexican Mafia and he is under direct supervision of the Mexican Mafia. [¶] . . . [¶]

> ". . . That Bouncer is assisting him in running one of the pods at Lerdo – assisting [defendant] of running one of the pods at the Lerdo jail facility. [¶] . . . [¶] . . . I know that . . . Ochoa, who is also known as Bouncer, is also a member of a criminal street gang Colonia Bakers 13.[12] [¶] . . . [¶]

> ". . . [Defendant] signs it as Alfred Feliz and refers to him[self] as a camarada. [¶] . . . [¶] . . . A camarada is a soldier, a soldier of the Mexican Mafia. He is an associate."

Sheriff's sergeant Jennings of the Detentions Bureau, monitored incoming and outgoing mail. In September 2013, he intercepted letters associated with defendant. In one letter, which was signed "Alison" and to be sent to Perez, defendant wrote:

> "As always, my love is sent to you also from the family. As soon as I got in town, I seen some old ho Mike[i]o . . . . All I could think about old times and gave her a ride to the cemetery. Crazy how many years go by. It's like old friends are always around. So I just had a good time, had a few drinks, and just gave it to her."

Sheriff's deputy King, who was assigned to the Detentions Bureau, also monitored incoming and outgoing mail. In October 2013, he intercepted letters associated with

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12 Likewise, Bravo testified he "knew from during this investigation and from prior investigations . . . [that] Ochoa's moniker for his criminal street gang, the Colonia Bakers, is Bouncer."

defendant. Two letters from Pelican Bay State Prison were signed "Chavo" and addressed to "Alison." At trial, King testified:

> "[T]he stamp was an identifier that it was coming from a state institution. Second was the signature. Chavo was significant knowing that he is a documented Mexican Mafia member who was housed at Pelican Bay at the time. And the address – the opening line where it was addressed to Alison indicated that they were attempting to circumvent the mail when it came in."

King previously interacted with Perez and knew he had the moniker "Chavo." He knew Perez was a documented Mexican Mafia member, "the only living Mexican Mafia member from Kern County," and "the recognized leader of Kern County for all the Sure[ñ]os."

In another letter, which was signed "Alfred," "Loma Bakers," and "camarada" and addressed to Eddie Castro, defendant wrote:

> "As for myself, I am sitting here fighting vida . . . . Remember [Miguel], Mike[i]o . . . . I ran into him on the calles, . . . and you know me. Well, Mr. [Ed] . . . . Bizz is bizz. Your Brother is aware of it. He seen it in the newspaper and now . . . has me working here . . . in my location for him. As well as we all know it's his [city]. So I am here with some hard-headed kids who don't believe and question one's status. Mr. Chavo says he should be back down here before summer's end or by the end of the year to reduce his sentencing since that new law passed of three strikes."

King testified Castro was a documented Mexican Mafia member "out of the Los Angeles area."

h. *Gang expert.*

Police officer Malley was the prosecution's gang expert.

i. Background on the Sureños and Mexican Mafia.

Malley testified the Sureños are a criminal street gang that claims "California south of the Delano area" as its territory and whose primary activities include murder and attempted murder; assault with a deadly weapon; robbery; kidnapping; extortion; burglary; carjacking; unlawful firearm possession; witness intimidation; criminal threats;

vehicle theft; possession of stolen property; and vandalism. Sureños, who are typically Hispanic, identify with the words "South," "South Side," and "Sur." They also identify with the number 13 because the 13th letter of the alphabet ("M") stands for the Mexican Mafia, also known as "Eme." Sureños are the "foot soldiers" of the Mexican Mafia, the "parent prison gang" that "controls their activity." They "commit acts on behalf of the Mexican Mafia out on the streets." Sureños respect both Mexican Mafia members and Mexican Mafia associates who are "a notch [below] . . . Mexican Mafia member[s]." "[One] must be a Sure[ñ]o to be a Mexican Mafia associate or member."

"[A]t least a few thousand" Sureños reside in Bakersfield. In addition to the words "South," "South Side," and "Sur" and the number 13, they identify with the words "Bakers" and "Kern County" and the abbreviations "BKS" (for Bakers) and "KC" (for Kern County). Local Sureño subsets include the Loma Bakers, Colonia Bakers, Varrio Bakers, South Side Bakers, Oakie Bakers, East Side Bakers, West Side Bakers, Brown Pride Locos, and Lamont 13. According to Malley, "out on the streets," "[t]here are certain [subsets] that feud with each other, . . . there are others that are allies, . . . there are some that don't really get along with much of anybody, and then there are an occasional one or two that really don't have any traditional enemies." By contrast, in a custodial setting, where Sureños are housed together, members of different subsets "are expected and required to intermingle and associate with each other" and "get along together" by edict of the Mexican Mafia. Consequently, members of different subsets often end up committing crimes together. Malley explained:

> "It's . . . a continuing trend among neighborhood gang members or street gang members who repeatedly go into prison and jail facilities and associate themselves with people from other neighborhood gangs who traditionally could be their rivals. It's especially prevalent among older members of street gangs who have been in prison or been incarcerated for a good deal of their life. It's normal for them at this point. . . . [A]lthough there are rivalries and allies . . . out on the street, it is common for them to

blend and intermingle and commit crimes together both in and out of custody."

Malley described the relationship between the Sureños' criminal conduct and the gang's status and level of "respect":

> "[T]he way that gang members obtain respect is through fear. They instill fear into the members of the community, and they instill fear into members of other gangs, and that's how they basically obtain that respect and that status. The bigger amount of fear they are able to instill in the people in general, the greater amount of status they will have out on the streets. [¶] . . . [¶]
>
> ". . . Respect is typically achieved through intimidation and through either violence or threats of violence or violent criminal acts and through the types of crimes that they commit. It can also be obtained through intimidating members of the community by basically taking over a neighborhood and establishing a stronghold for that gang to prosper, conduct narcotic sales, as well as other criminal activities that benefit the gang. [¶] . . . [¶]
>
> "[Having a reputation to be feared] benefits the gang because it deters people from going against that gang, whether that be rivals from another neighborhood or community members or even members of law enforcement. It basically ensures that people will stay out of their way when they are conducting their crimes."

"[T]he ones who commit the most violent acts are going to be revered as the ones with the most respect or most juice." Those "who have a great amount of influence and control over other members in the gang," also known as "shot callers," "made it to [that] point by . . . committing greater acts of violence and things that are seen as openly promoting or bettering the gang as a whole."

On the matter of snitching, Malley testified:

> "[W]ith regards to Sure[ñ]os and the Mexican Mafia, snitching is a matter of the utmost disrespect when somebody does that. And it is seen in a variety of different ways. There are ways that snitching can be seen through the eyes of Southern Hispanic or Sure[ñ]o gang members. . . . [L]et's say they get arrested and a few, maybe two or three, gang members get arrested together. Maybe one [of] them gives a statement to police and he talks and he says too much. And whether or not his intent was to

> incriminate other people or not, if he did it even in a very limited fashion, even by accident, that could be seen as snitching, and that could be punishable.
>
> "And, again, the punishment for snitching depends entirely on the severity of the offense that the snitching consisted of. For kind of a minor offense like that, somebody could be given a brutal beating or be stabbed or be checked. In other words, they will basically check them and let them know it won't ever happen again because next time they will be killed.
>
> "For a more severe offense, say, like, testifying in a court of law, somebody could be killed."

Malley noted the Sureños would benefit from the death of a confidential informant:

> "[If] somebody [were] to silence a source of police information or basically take an informant out of the picture the police are using as a tool to help them with investigations, it could benefit the entire gang as a whole because you are basically taking a source of information out of a scenario and making sure that it will never be used again against the gang."

ii. Predicate offenses.

Malley identified six cases involving the commission of predicate offenses by members of different Sureño subsets. He reviewed reports and/or spoke with the officers involved in the criminal investigations.

On December 27, 2012, Robert Hurtado and Jose Lemos committed armed robbery. Hurtado had "a large VB tattooed on his face" and "admitted he was an active Varrio Baker." Lemos had "a large G tattooed on his face" signifying "Gage Street," a subgroup of the Loma Bakers. In addition, Hurtado "stated he knew Lemos was a Loma Baker and they had a relationship together which was . . . fostered during their time either in prison or in county jail together." Both pled nolo contendere to robbery.

On December 21, 2012, sheriff's deputies conducted a search at the residence of Javier Rodriguez, and found a loaded assault rifle. Rodriguez pled nolo contendere to possession of a firearm by a felon. Ochoa, who was at the residence at the time of the search and tried to prevent deputies from entering the home, pled nolo contendere to gang participation. Rodriguez was a Brown Pride Loco and Ochoa was a Colonia Baker.

On November 30, 2012, Jason Arnison, Salvador Escalera, and Gabriel Rivera committed armed robbery. Arnison and Rivera "admitted to being Colonia Bakers" and pled nolo contendere to robbery and gang participation. Escalera "had obvious Oakie Baker tattoos on his face"—e.g., "a giant O and a giant B on his forehead," "Oakie BKS written on his upper lip," and "a giant O on the right side of his face"—and pled nolo contendere to grand theft.

On April 27, 2010, Adolf Casica and Pablo Salas killed a victim in her home and took her possessions. Each was convicted of murder, robbery, and gang participation. Casica was "a South Side Baker who goes by a moniker of Monster" and Salas was "a Varrio Baker who goes by the moniker of Psycho."

On December 31, 2009, Jose Cardenas and Zachary Epps carjacked and kidnapped a victim, threatened his family, and used his debit card to withdraw money. Cardenas, who "admitted he was a Colonia Baker," pled nolo contendere to kidnapping. Epps, who "admitted he was an East Side Baker," was convicted of conspiracy, kidnapping to commit robbery, assault with a deadly weapon, and witness intimidation. Both were found to have committed a felony on behalf of a criminal street gang.

On August 6, 1997, defendant and his cousin Richard Feliz carjacked a victim. Defendant pled guilty to carjacking. Richard pled nolo contendere to carjacking. Each was found to have used a firearm during the commission of the felony. Defendant was a Loma Baker and Richard was a Varrio Baker. Richard Feliz confirmed defendant's gang affiliation.

The court admitted into evidence certified copies of each case's "FELONY AMENDED COMPLAINT" or "FELONY AMENDED INFORMATION" and "REGISTER OF ACTIONS/DOCKET."

iii. Opinion on defendant's gang affiliation.

Based on the totality of the circumstances, Malley opined defendant was a Sureño on May 20, 2013. Photographs of defendant exhibited several gang-related tattoos,

including the words "Loma" on his lower back and right shin and "Bakers" on his stomach. Between June 27, 1997, and April 30, 2013, he was booked into jail at least six times. Booking information from each occasion indicated defendant identified himself as a "validated Eme associate," a Loma Baker, and/or a member of a "South" or "Sur" gang or subset in response to jail classification questions. In sheriff's field interview cards dated May 14, 1994; July 9, 1994; and June 22, 1996, and a 2009 police department "street check,"[13] he admitted his affiliation with the Sureños and/or the Loma Bakers. A 2010 sheriff's office report detailed defendant attacked a detention deputy and uttered, "I am Mexican Mafia." In connection with the August 6, 1997, predicate offense, defendant engaged in one of the Sureños' primary activities (carjacking) with another Sureño (Richard). In connection with the events of May 20, 2013, defendant engaged in many of the Sureños' primary activities (attempted murder, kidnapping, assault with a deadly weapon, unlawful firearm possession) with another Sureño (Ochoa) "to settle a disrespect issue with someone who had spoken to the police, which is traditionally how those disputes are settled."

In forming his opinion, Malley found the testimonies of other prosecution witnesses helpful:

> "The . . . thing that I was able to gather from the testimony is that [defendant] is a Loma Baker and . . . Ochoa is a Colonia Baker. These gangs are traditionally rivals on the streets. Youngsters from these gangs will fight each other, assault, stab, shoot each other at will. But, as I have

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13 Malley described a "street check":

> "It's simply a piece of police documentation. It is not necessarily our police report. It is not something that is intended to be used as incriminating, but it is basically a document that we generate when we feel anything needs to be put on record, anything that is worth noting. . . . [T]he context in which I use street checks as a gang investigator is I use them to document gang-related intelligence that I collect on the streets, which is usually done by speaking with gang members and interacting with them in the public."

testified before, once these people have spent a great deal of time in custody and been around each other and been around various subsets or factions of the Sure[ñ]os in an in-custody setting, they are very much more likely to commit crimes together and they do often commit crimes together. And this case is a shining example of that, in my opinion. [¶] . . . [¶]

". . . The fact that [defendant] is an influential inmate when he goes into a facility and he does run or is perceived to run, at least part – or was requesting permission or said he had been granted permission to run a facility or at least . . . part of that facility. [¶] It's . . . of great significance to me that he's able to do that, and it goes to show you that he has a great deal of respect of probably not only the people within his own street gang, but he has a great deal of respect from other inmates when they are in custody and he is able to command that type of respect and kind of have that type of control over people. And that control would include . . . Ochoa, who was with him at the time, although, through the testimony, he never said any words to the victim, nor did he ever address the victim directly. He did exchange the firearm with [defendant] and willingly participated in that crime. That kind of shows you how he can have so much control over another Sure[ñ]o."

"I . . . found it extremely significant that there seemed to be a great deal of correspondence between [defendant] and various ranking Sure[ñ]o gang members either in custody or outside of custody or Sure[ñ]o associates who he was relying on to do business for him as far as locating the victim and continuing to make efforts to settle the disrespect issue that he had been confronted with when Miguel . . . provided information to the police that implicated him in a crime."

iv. Opinion on Ochoa's gang affiliation.

Based on the totality of the circumstances, Malley opined Ochoa was a Sureño on May 20, 2013. Photographs of Ochoa exhibited several gang-related tattoos, including the abbreviation "BP" (for Brown Pride) on one shoulder, the words "Sur" on his right shoulder and "Bakers" on his upper back, and the name "Colonia Bakers" on the right side of his torso. Since September 2006, he was booked into jail at least 10 times. Booking information from each occasion indicated Ochoa identified himself as a member of the "South" gang in response to jail classification questions. One police department report showed a vehicle pulled over by law enforcement in April 2013 was occupied by

Ochoa, Adam Ceniceros (a Loma Baker member), and Jesse Bueno (a Lamont 13 member) and contained "a sawed-off .410-gauge shotgun, some beanies with holes cut in them, and a pair of handcuffs." Another police department report showed Ochoa and an unidentified accomplice carjacked and stole the personal belongings of a victim on September 2, 2007. In a sheriff's office field interview card dated January 28, 2006, Ochoa admitted he affiliated with Sureños.

v. Hypothetical question.

The prosecutor asked Malley the following hypothetical question:

> "I want you to assume that you have two active members of the Sure[ñ]os criminal street gang. They ride together in a car to a location where they see a former Sure[ñ]o gang member. One Sure[ñ]o is driving. The other Sure[ñ]o is a front-seat passenger.
>
> "The Sure[ñ]o driver points a gun at the former Sure[ñ]o and tells him to get in the car. The former Sure[ñ]o reluctantly enters the car and sits in the front-passenger seat. He entered the vehicle to avoid a shooting in front of . . . children. The Sure[ñ]o passenger moves to the backseat directly behind the former Sure[ñ]o, and he retrieves a firearm from the Sure[ñ]o driver.
>
> "The Sure[ñ]o driver drives the car around for about 15 minutes while accusing the former Sure[ñ]o of snitching on him and snitching on big homies in Ventura . . . . [¶] When the car is about to turn onto a highway in the direction of a secluded area, the former Sure[ñ]o attempts to flee from the vehicle and is shot by the driver Sure[ñ]o as soon as he exits the car. The driver Sure[ñ]o attempts to continue firing the gun, which is locked up. [¶] The former Sure[ñ]o flees, and the Sure[ñ]o driver and passenger flee in the subject vehicle.
>
> "The Sure[ñ]o passenger is spotted driving the suspect vehicle later that evening and takes the BPD on a police pursuit. The incident takes place in Sure[ñ]o territory. The Sure[ñ]o driver is an influential Eme associate and communicates with other Eme associates and an Eme member about his exploits involving the victim.
>
> "Do you have an opinion as to whether the crimes in that hypothetical were committed for the benefit of, at the direction of, or in association with the Sure[ñ]os criminal street gang?"

Malley replied the crimes "were committed for the benefit of the Sure[ñ]os, as well as in association with the Sure[ñ]os." He detailed:

> "As far as the benefit theory is concerned, it is a crime of pure shock value that somebody would come and forcibly remove another person from a location where either friends and family or other subjects are present in either conditions where they could be easily seen or in conditions where they could be perceived to be easily seen and taken elsewhere.
>
> "It's also for the benefit of the Sure[ñ]os as a whole because the perceived snitching or the perceived betrayal by a member or former member of the Sure[ñ]os is something that must be met with a great amount of punishment, and it has to be done in a manner that is an example to others and is basically being done to silence that person and to be seen in that fashion.
>
> "It not only benefits the individuals as far as sheer revenge value goes for people that this person may have given information about, which is what he is being confronted about by one of the suspects, but it also goes to benefit the entire gang as a whole because that type of brutal crime is seen by members of the community, and it instills fear into community members and to members of law enforcement who have to deal with these types of people, and it also instills fear into other gang members who are potentially going to either begin or are in various stages of the dropping out or the debriefing process. It, more or less, serves as an example to all, and it serves as an example of why people need to feel that intimidation and give respect to an influential member of that gang. [¶] . . . [¶]
>
> ". . . I base my opinion on the association theory, first on the fact that you have two Sure[ñ]os who appear to be planning and committing a crime together, which is a primary activity of that gang, and the fact that throughout the process of them committing that crime or those crimes, they are both openly knowledgeable what's going on, and there is no deniability between the two about what the other one is doing. [¶] . . . [¶] . . . [D]uring the commission of a crime and the period of time afterwards where the police are going to be looking for members of the gang who were involved, there is a better chance of evidence being able to be either gotten rid of, disposed of, handed off to other subjects, or otherwise concealed from law enforcement.
>
> "It also benefits the gang because if one of those members is caught, the other one can continue to make arrangements for the member who is caught and is now in a custody setting – can continue to make arrangements

> for that subject by means of contacting people on the outside, which is common."

Malley added the "mere possession of the gun . . . by a member of [the] gang" is "a benefit to the gang." He explained:

> "It's a direct benefit to the entire gang as a whole because that firearm is a communal item. It's a piece of communal property, which is a tool that the entire gang is welcome to and will use to openly commit crimes, which could vary from gang shootings against their rivals to a various amount of violent felony crimes which are within the primary activities of that gang. But the firearm can also directly benefit the gang because it can be used to defend against the gang's rivals."

II. Defense's case-in-chief.

Defendant testified he was a methamphetamine dealer. He obtained his supply from "[d]ifferent connections," paying between $150 and $350 per pound. In turn, he earned "up to [$]2,500" per week "push[ing]" "[n]o more than a pound." Sometime after April 15, 2009, Gerald introduced defendant to Miguel, another drug dealer. Sometime after November 2, 2012, defendant met Ochoa, who later became his subdealer. At trial, defendant acknowledged he provided drugs to Jessica.

Two or three days before May 20, 2013, defendant gave Gerald's "beat-up [cell] phone" to Ochoa because it contained contact information for various buyers. This was the same phone Bravo found in the Sebring after the car was impounded.

On May 20, 2013, at approximately 6:30 p.m., defendant met Ochoa outside Adolf's trailer. Ochoa was alone in Jessica's Sebring. Defendant gave Ochoa two ounces of methamphetamine and instructed him to sell some to Adolf's girlfriend, who lived near the Mount Vernon Avenue-Pacific Street intersection. After Ochoa left, defendant returned to the trailer. He did not see Ochoa for the rest of the night. Later, defendant went to Delia T.'s house and remained there until "about midnight."[14] At no

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14 Delia, a defense witness, testified defendant contacted her at or around 6:00 p.m. She picked him up and brought him to her house, where he stayed until "around midnight maybe."

point did he contact Miguel or drive the Sebring. However, defendant admitted the subject matter of a "jail call[]" "with Tinker" was "the location [of] or trying to find Miguel . . . ."

Defendant "grew up in . . . Loma [territory]." He considered himself to be a Loma Baker because he "[was] not going to forget where [he] came from." Defendant received his Loma Baker tattoos while he was in prison. Over the course of his 13-year incarceration, he was housed with Sureño inmates "from LA, Orange County, San Diego, [and] throughout California" and "became close" with many of them. Defendant "got schooled by the older generation" of Sureño inmates. In Pelican Bay State Prison, he met "quite a few" Mexican Mafia members. Defendant was deemed a "validated Eme associate" because he possessed a cultural drawing and two confidential informants alleged he participated in gang-related activity. He denied telling a detention deputy, "You don't put hands on me. I am Mexican Mafia."

Defendant conceded he wrote the July 18, 2013, letter to Velasquez. (See *ante*, at pp. 21-22.) He testified:

> "At that time I am incarcerated. At that time [Velasquez] supposedly be running the facility when he is not incarcerated. [¶] . . . [¶] . . . . I was pretty much telling him to leave who he has in place because I didn't want a headache at that time. And when I say that, with my knowledge of what I learned being incarcerated, you can't run a facility when you are on the street. You have to be present. You have to know what's going on. [¶] . . . [¶]
>
> ". . . I am actually talking about taking charge of the whole facility. I mean, when somebody says – like, for instance, I am going to use the example myself. When I say I am running the facility, I am running the whole facility. Max, Lerdo, the farm. I am responsible for everybody in the institution. When somebody wants to get beat up, somebody has a bad charge, they will notify me. Either I allow it or I won't."

Defendant acknowledged he "r[a]n" the "Southern Hispanics" section of the Lerdo jail facility "at one time."

Defendant first met Perez "when [he] was a [teenager], back in the early '90s." At one point, they were housed in the same "short corridor" in Pelican Bay State Prison. Defendant conceded he wrote the letter to Perez that referred to "old ho Mike[i]o." (See *ante*, at p. 22.) He testified:

> "What I am making reference to that, people who are involved in the activity I am allegedly involved in actually code a lot of stuff. When they make reference to them, they are pretty much letting the next person know they have knowledge of what happened. [¶] . . . [¶]
>
> ". . . Letting him know I gained knowledge of what occurred, why I am here, who actually done it. Things of that nature is what I am referring to. When I say cemetery, I am actually meaning somebody tried to kill [Mikeio]. [¶] . . . [¶] . . . Because apparently he got shot."

In 2010, defendant met Castro while the two were incarcerated in Wasco State Prison. Defendant conceded he wrote the letter to Castro containing the line "Bizz is bizz." (See *ante*, at p. 23.) He testified:

> "That's referring to when an incident occurs. I mean, something pretty much happened so I say 'biz[z] is biz[z].' I know what happened. I found out what happened through the course of this. I mean, of course I am gonna aware somebody else why somebody got hurt, out of . . . [Miguel]'s status. I didn't know he was a dropout."

Defendant confirmed Perez is the "Brother" in the line "Your Brother is aware of it."

Cecilia G. testified Miguel, her son, lived in a neighboring apartment in May 2013. On May 20, 2013, she attempted to visit him, but he was not home. Cecilia did not see Miguel at all that day. She also testified Miguel's daughters did not live at the apartment and "never went" there. Cecilia last saw her son and her granddaughters together "maybe three, four" years earlier.

Sheriff's deputy Delagarza interviewed Miguel in the emergency room at Kern Medical Center on May 20, 2013. He told her he was shot "as he was attempting to leave" and "was partially in[,] trying to get out of the vehicle."

DISCUSSION

I. Defendant's non-gang-related arguments.

a. *Instructing the jury on attempted voluntary manslaughter*.

i. Standard of review.

"A claim of instructional error is reviewed de novo." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 759, citing *People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

ii. Analysis.

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed. [Citations.]" (*Id.* at p. 162.)

" 'Murder is the unlawful killing of a human being with malice aforethought. [Citation.] A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. [Citation.]' [Citation.] Generally, the

intent to unlawfully kill constitutes malice. [Citations.] 'But a defendant who intentionally and unlawfully kills lacks malice . . . when the defendant acts in a "sudden quarrel or heat of passion" . . . .' [Citation.] Because heat of passion . . . reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide [citation], voluntary manslaughter . . . is considered a lesser necessarily included offense of intentional murder [citation]." (*Breverman, supra,* 19 Cal.4th at pp. 153-154, italics & fn. omitted.)

"An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' [citation], and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' [Citations.]" (*Breverman, supra*, 19 Cal.4th at p. 163.) "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively." (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) " ' "[N]o specific type of provocation [is] required . . . ." ' [Citation.] Moreover, the passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citation] other than revenge [citation]. 'However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . .' [Citation.]" (*Breverman, supra,* at p. 163.)

According to defendant, he "shot [Miguel] in a fit of anger that was the product of the sudden quarrel and heat of passion he had experienced during the events with [Miguel]." The record, however, shows defendant, accompanied by Ochoa, drove up to Miguel, pointed a handgun at him, and ordered him to get in the car. After Miguel complied, defendant drove away from a residential zone toward a more remote location.

During the ride, which lasted between 15 and 25 minutes, defendant angrily accused Miguel of snitching. Yet, he did not inflict any bodily harm until Miguel attempted to escape. These circumstances do not evince "[defendant]'s reason was so disturbed by anger or outrage that he acted impulsively." (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.) Rather, they manifest a plot, albeit an unsuccessful one, to retaliate against Miguel for his "ratting" in a secluded area. "[T]he desire for revenge does not qualify as a passion that will reduce a killing to manslaughter." (*Ibid.*; accord, *Breverman*, *supra*, 19 Cal.4th at p. 163.) Furthermore, we are unwilling to find Miguel "provoked" defendant by helping law enforcement apprehend those—including defendant—who would ultimately be convicted in criminal court; by failing to admit his status as a confidential informant and thereby "justify" defendant's actions; and/or by trying to flee and thwart his own death. (See *People v. Steele*, *supra*, 27 Cal.4th at pp. 1252-1253 [" '[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless . . . the jury believe[s] that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' "].) The trial court had no obligation to instruct the jury on attempted voluntary manslaughter.

Even if we assumed, arguendo, substantial evidence justified an instruction on attempted voluntary manslaughter, the jury found true the allegation the attempted murder was willful, deliberate, and premeditated, "negat[ing] any possibility that defendant was prejudiced from the failure to instruct" on the lesser included offense. (*People v. Cruz* (2008) 44 Cal.4th 636, 665; cf. *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1126, 1138 [the jury was unable to return a verdict on such an allegation].)

b. *Defendant's claim of ineffective assistance of counsel.*

Next, defendant contends defense counsel rendered ineffective assistance by failing to request instructions pertaining to voluntary intoxication, namely CALCRIM Nos. 404 (Intoxication), 625 (Voluntary Intoxication: Effects on Homicide Crimes), and 3426 (Voluntary Intoxication). We reject this claim.

To establish ineffective assistance of counsel, a defendant must show (1) defense counsel did not provide reasonably effective assistance in view of prevailing professional norms; and (2) defense counsel's deficient performance was prejudicial. (See *People v. Oden* (1987) 193 Cal.App.3d 1675, 1681, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "It is . . . particularly difficult to establish ineffective assistance of counsel on direct appeal, where we are limited to evaluating the appellate record. If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

The record before us " 'does not illuminate the basis for the attorney's challenged acts or omissions . . . .' " (*People v. Silvey* (1997) 58 Cal.App.4th 1320, 1329.) Defense counsel was never asked to explain why he did not request voluntary intoxication instructions. Nor can we find "no satisfactory explanation" (*People v. Scott*, *supra*, 15 Cal.4th at p. 1212) for his forbearance. In the instant case, "[t]he primary defense theory at trial was that defendant had not committed the crimes of which he was accused." (*People v. Olivas* (2016) 248 Cal.App.4th 758, 771.) Defendant testified he never saw Miguel on May 20, 2013. In summation, defense counsel, who characterized Miguel's testimony as the pillar of the prosecution's case, continually asserted Miguel was "not being truthful." "Requesting an instruction on voluntary intoxication would have implied that defendant committed the [crimes]" (*ibid.*), which would have been "wholly inconsistent with the primary defense theory that [Miguel] 'told a lie' and defendant did

not actually engage in . . . misconduct" (*ibid.*). (See *Yarborough v. Gentry* (2003) 540 U.S. 1, 8 ["[J]udicious selection of arguments for summation is a core exercise of defense counsel's discretion. [¶] When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."].) Thus, defense counsel "reasonably could [have] decide[d] to forgo [such an] instruction for tactical reasons." (*People v. Dennis* (1998) 17 Cal.4th 468, 527.)

c. *The trial court's refusal to sustain defendant's objection to Bravo's remark that Jessica's Sebring was used to kidnap Miguel.*

i. Background.

On recross-examination, defense counsel questioned Bravo about the phone call between defendant and C.M. (See *ante*, at pp. 10-12.) In particular, defense counsel inquired about the significance of C.M. asking defendant, "You've been with [Jessica]?" Bravo testified "been with her" is a "term used in . . . conversations with . . . gang members and their significant others when they've been accused of cheating . . . ." Defense counsel then asked whether "non-gang members also use that phrase 'been with her.' " Bravo responded:

> "Yes. Just like non-gang members will use common street slang terms that gang members use, . . . such as certain gang phrases that are popular in pop culture that has gone away from the gang culture and has entered pop culture, yes. [¶] . . . [¶]
>
> ". . . It goes across lines, but here you have two gang members discussing a third gang member, and they describe [Jessica] as 'the girl with the car.' Again, . . . [Jessica]'s car was the vehicle used to kidnap . . . [Miguel] and where he was shot from and that . . . Ochoa led police in a pursuit."

Defense counsel objected to Bravo's testimony "with regard to the use of the term 'kidnapped' " as an improper legal conclusion. The court overruled the objection.

ii. Analysis.

Assuming, arguendo, the court should have sustained defense counsel's objection to Bravo's testimony, its decision not to do so did not constitute prejudicial error.

By constitutional mandate, "[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); accord, *People v. Callahan* (1999) 74 Cal.App.4th 356, 363.)

Even in the absence of the purported error, it is not reasonably probable defendant would have obtained a more favorable verdict as to the kidnapping charge. " 'Generally, to prove the crime of kidnapping, the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. [Citation.]' [Citation.]" (*People v. Dalerio* (2006) 144 Cal.App.4th 775, 781, fn. omitted.) The record shows defendant drove up to Miguel, pointed a handgun at him, and ordered him to get in the Sebring. Miguel, who was with his daughters and did not want a shooting to erupt in front of them, complied. (See *People v. Arias* (2011) 193 Cal.App.4th 1428, 1435-1436 [a rational trier of fact could conclude the victim was involuntarily moved by the use of force or fear when the defendant pointed a gun at him and followed him into his apartment].) Defendant drove away from the residential zone. During the ride, which lasted between 15 and 25 minutes, he angrily accused Miguel of snitching. Thereafter, the Sebring stopped at the Mount Vernon Avenue/Alfred Harrell Highway-Panorama Drive intersection and would have headed to a secluded area had

Miguel not attempted to escape at that moment. (See *People v. Martinez* (1999) 20 Cal.4th 225, 237 ["[I]n a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes."].) "There is no doubt that . . . defendant, in forcing [Miguel] . . . into [his] automobile and then driving as he did under the circumstances, committed an act of kidnapping." (*People v. Gunn* (1959) 170 Cal.App.2d 234, 239.)

To the extent defendant suggests the more stringent "harmless beyond a reasonable doubt" standard prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), is the proper test of reversible error (see at pp. 57-58, *post*), we disagree. The application of ordinary rules of evidence does not implicate the federal Constitution; therefore, we review allegations of evidentiary error under *Watson*'s "reasonable probability" standard. (*People v. Harris* (2005) 37 Cal.4th 310, 336; *People v. Marks* (2003) 31 Cal.4th 197, 226-227.)

d. *Substantial evidence defendant discharged a firearm from a motor vehicle at another person outside of the vehicle*.

i. Standard of review.

To determine the sufficiency of the evidence to support a conviction or an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*); *People v. Tripp* (2007) 151 Cal.App.4th 951, 955.) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) If the circumstances, plus

all the logical inferences the trier of fact might have drawn from them, reasonably justify a finding, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*Albillar, supra*, at p. 60; *People v. Tripp*, *supra*, at p. 955.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

ii. *Analysis*.

The record, viewed in the light most favorable to the judgment, shows Miguel opened the front passenger side door of the Sebring. As he was exiting the car, he looked back and saw Ochoa handing defendant the gun. When Miguel was outside the car, he "got shot in the back." (See *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 [testimony of a single witness may constitute substantial evidence].)

Defendant argues "it was inherently improbable and physically impossible for [Miguel] to have been outside of the car when he was shot." He points to Pair's testimony about stippling (see *ante*, at p. 7 & fn. 7), defendant's "diminutive stature," Miguel's "likely physical characteristics," and "the dimensions of the [Sebring]."

" ' "To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." ' " (*People v. Barnes* (1986) 42 Cal.3d 284, 306; accord, *People v. Thompson* (2010) 49 Cal.4th 79, 124.) Here, Miguel's testimony "did not recount facts that were physically impossible, nor did it exhibit falsity on its face. Rather, defendant's contention that [Miguel]'s testimony was inherently incredible depends on the asserted inconsistencies that defendant argues exist between [Miguel]'s testimony and other evidence presented at

trial.[15] We reject defendant's attempt to reargue the evidence on appeal and reiterate that 'it is not a proper appellate function to reassess the credibility of the witnesses.' [Citation.]" (*People v. Thompson, supra,* 49 Cal.4th at pp. 124-125.)

Alternatively, defendant argues the Legislature never intended for section 189 to cover scenarios in which a firearm is discharged from a stationary vehicle. We disagree. "The court's role in construing a statute is to 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citations.] In determining the Legislature's intent, a court looks first to the words of the statute. [Citation.] '[I]t is the language of the statute itself that has successfully braved the legislative gauntlet.' [Citation.] [¶] When looking to the words of the statute, a court gives the language its usual, ordinary meaning. [Citations.] If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs. [Citations.]" (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.) The pertinent language of section 189 refers to "any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death." Nothing in the statute explicitly requires said vehicle to be in motion.

Substantial evidence established defendant discharged a firearm from a motor vehicle at another person outside of the vehicle.

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15 We point out defendant cites sources that were not before the jury. "[A]n appellate court generally is not the forum in which to develop an additional factual record, particularly in criminal cases when a jury trial has not been waived." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207.) Thus, we decline to consider these sources. (See *People v. Davis* (2013) 57 Cal.4th 353, 360 ["The critical inquiry is whether 'the *record* evidence could reasonably support a finding of guilt beyond a reasonable doubt.' "].)

e. *Although the recent amendment to section 12022.53 applies retroactively to the instant case, a remand for reconsideration of the enhancement is unnecessary.*

i. Background.

On May 20, 2015, the court pronounced defendant's sentence:

"In this case after considering the evidence that was presented and the probation officer's report, the Court will find . . . circumstances in mitigation, there aren't any factors applicable. In circumstances in aggravation, . . . defendant's prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous. He was on post release community supervision when this crime was committed. And his prior performance on juvenile probation, state parole, and post release community supervision were unsatisfied in that he failed to comply with terms and continued to reoffend. Given . . . defendant's criminal history, the Court does find that the upper term is appropriate in sentencing . . . defendant to a determinate term sentence. Likewise, the Court finds that . . . defendant is statutorily ineligible for a grant of felony probation absent unusual circumstances. The Court, at this time, finds that there are no unusual circumstances that would allow probation in this case.

"It is therefore, with those thoughts in mind, that . . . defendant is sentenced as follows: As to Count 1, a violation of . . . [s]ection[s] 664[and]187[, subdivision]([a]) with . . . [s]ection 189[,] . . . [s]ection 186.22[, subdivision]([b])(1)[, and] . . . [s]ection 667[, subdivision]([e]), probation is denied and . . . defendant is sentenced to the Department of Corrections for the term prescribed by law of 30 years to life. This sentence is enhanced by 25 years to life pursuant to . . . [s]ection 12022.53[, subdivision]([d]) and it is further enhanced by five years pursuant to . . . [s]ection 667[, subdivision]([a]) and . . . two years pursuant to two [applications] of . . . [s]ection 667.5[, subdivision]([b]). [¶] . . . [¶]

"As to Count 2, a violation of . . . [s]ection 207[, subdivision]([a]) with . . . [s]ection 667[, subdivision]([e]), probation is denied. . . . [D]efendant is sentenced to the Department of Corrections for the upper term of 16 years. This sentence is enhanced by ten years pursuant to . . . [s]ection 186.22[, subdivision]([b])(1). This sentence is further enhanced by 25 years to life pursuant to . . . [s]ection 12022.5[, subdivision

](d])[,][16] . . . five years pursuant to . . . [s]ection 667[, subdivision](a])[,] and . . . two years pursuant to . . . [s]ection 66[7].5[, subdivision](b]). Those are two sections of . . . [s]ection 667.5[, subdivision](b]). [¶] Punishment for this sentence and enhancement is ordered stayed pursuant to . . . [s]ection 654. [¶] . . . [¶]

"As to Count 3, a violation of . . . [s]ection 245[, subdivision](a])(2) with . . . [s]ection 667[, subdivision](e]), probation is denied. . . . [D]efendant is sentenced to the Department of Corrections for the upper term of eight years. This sentence is enhanced by ten years pursuant to . . . [s]ection 186.22[, subdivision](b])(1). The sentence is further enhanced by ten years pursuant to . . . [s]ection 12022.5[, subdivision](a]) and . . . three years pursuant to . . . [s]ection 12022.7. [¶] This punishment for this sentence and enhancements is stayed pursuant to . . . [s]ection 654. [¶] . . . [¶]

"As to Count 5, violation of . . . [s]ection 186.22[, subdivision](a]) with . . . [s]ection 667[, subdivision](e]), probation is denied. . . . [D]efendant is sentenced to the Department of Corrections for the upper term of six years. This sentence is enhanced by ten years pursuant to . . . [s]ection 12022.5[, subdivision](a]) and . . . three years pursuant to . . . [s]ection 12022.7. [¶] Punishment for this sentence and enhancements is ordered stayed pursuant to . . . [s]ection 654. [¶] . . . [¶]

"As to count 8, violation of . . . [s]ection 29800[, subdivision](a])(1) with . . . [s]ection 667[, subdivision](e]), probation is denied. . . . [D]efendant is sentenced to the Department of Corrections for the upper term of six years. This sentence is enhanced by ten years pursuant to . . . [s]ection 186.22[, subdivision](b])(1) and is further enhanced by ten years pursuant to . . . [s]ection 12022.5[, subdivision](a]). This sentence is further enhanced by three years pursuant to . . . [s]ection 12022.7. [¶] Punishment for this sentence and enhancements is ordered stayed pursuant to . . . [s]ection 654."

ii. Analysis.

At the time defendant was charged, convicted, and sentenced, subdivision (h) of section 12022.53 provided:

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16 In view of the record, including the information, minute order, and abstract of judgment, we believe this is a misprint and the court actually referred to section 12022.53, subdivision (d). The parties apparently agree.

> "Notwithstanding Section 1385 or any other provision[s] of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

After defendant was sentenced, but while his case was still pending on appeal, the Legislature enacted Senate Bill No. 620. As of January 1, 2018, subdivision (h) of section 12022.53 provides:

> "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Citing *People v. Francis* (1969) 71 Cal.2d 66, inter alia, the Attorney General concedes Senate Bill No. 620 applies retroactively to defendant's case since the case was not yet final when the amendment went into effect. We accept this concession without further analysis.

The remaining issue is whether remanding the matter for reconsideration of sentencing is appropriate. We find instructive *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*). In that case, the sole issue was whether "the trial court had discretion to strike the [appellant's] prior felony conviction in the furtherance of justice under the three strikes law." (*Id.* at p. 1895.) During the pendency of the appeal, the California Supreme Court determined trial courts have such discretion. (*Id.* at p. 1896, citing *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.) However, Division Two of the Second Appellate District ruled a remand for reconsideration of sentencing was unnecessary. It reasoned:

> "[T]he trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements." (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896; see *ibid.* ["Following appellant's conviction, the trial court imposed the high term for count 1, robbery, stating that appellant was 'clearly engaged in a pattern of violent conduct, which indicates he is a serious danger to society.' . . .

> The court noted that it had discretion whether to impose two additional one-year enhancements for prior convictions of petty theft and taking a vehicle without the owner's consent pursuant to section 667.5, subdivision (b). It stated that 'this is a situation where I do agree with [the prosecutor], there really isn't any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street as long as possible.' "].)

"We see no reason why [*Gutierrez*] would not apply in assessing whether to remand a case for resentencing in light of Senate Bill [No.] 620. That is, a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).)

In the instant case, "a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in . . . defendant's favor." (*McDaniels*, *supra*, 22 Cal.App.5th at p. 427.) The court found no circumstances in mitigation; instead, it highlighted several circumstances in aggravation, including defendant's numerous sustained juvenile delinquency petitions and adult criminal convictions; his poor performance on juvenile probation, state parole, and post-release community supervision; and the fact he was on post-release community supervision at the time of the May 20, 2013, kidnapping and shooting. (See *ibid.* [a defendant's recidivism "may be germane to assessing whether a trial court is likely to exercise its sentencing discretion in the defendant's favor"].) In light of this criminal history, the court—pursuant to section 667, subdivision (e)—doubled the minimum term of imprisonment for the indeterminate sentence on count 1. (Cf. *McDaniels*, *supra*, at p. 428 [trial court struck the defendant's four prior felony convictions " '[i]n the interest of justice' "].) It also prescribed—and likewise doubled—the upper term of imprisonment for the determinate sentences on counts 2, 3, 5, and 8. (See *Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896 [trial court imposed upper term for robbery]; cf. *McDaniels*, *supra*, at p. 428 [trial court imposed middle term for possession of a firearm by a felon].) "Under the

circumstances, no purpose would be served in remanding for reconsideration." (*Gutierrez*, *supra*, at p. 1896.)

II. Defendant's gang-related arguments.

a. *Defendant's responses to booking questions about his gang affiliation*.

Citing *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), defendant asserts his responses to booking questions about his gang affiliation, in which he identified himself as a "validated Eme associate," a Loma Baker, and/or a member of a "South" or "Sur" gang or subset (see *ante*, at pp. 27-28), were "un-*Mirandized*" and the prosecution's reliance on these responses violated his rights under the Fifth Amendment. The Attorney General concedes "*Miranda* warnings were required before [defendant's] statements could be used in the prosecution's case-in-chief" but maintains admission of these statements "was harmless beyond a reasonable doubt because [defendant]'s Sure[ñ]o affiliation was readily established by other, properly admitted evidence."

"The erroneous admission of a defendant's statements obtained in violation of the Fifth Amendment is reviewed for prejudice under the beyond a reasonable doubt standard of *Chapman* . . . ." (*Elizalde*, *supra*, 61 Cal.4th at p. 542.) "That test requires the People here 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*Ibid.*, quoting *Chapman*, *supra*, 386 U.S. at p. 24.)

At trial, defendant admitted he was a member of the Loma Bakers subset and had Loma Baker tattoos. In a letter addressed to Castro, defendant identified himself as a Loma Baker.[17] Bravo and Miguel, a former member of both the Lomita Bakers subset and the Mexican Mafia, each testified defendant was also an associate of the Mexican Mafia prison gang. Defendant testified he was deemed a "validated Eme associate." In letters addressed to Castro and Velasquez, defendant identified himself as a "camarada,"

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[17] In his reply brief, defendant concedes he was a validated Loma Bakers gang member.

signifying he was " a soldier of the Mexican Mafia." Malley and Miguel testified the Mexican Mafia commands the Sureños. Malley added "[one] must be a Sure[ñ]o to be a Mexican Mafia associate or member."

During his incarceration, defendant "got schooled by the older generation" of Sureños and "became close" with many Sureños. In Pelican Bay State Prison, he met "quite a few" Mexican Mafia members. Defendant and "Chavo" directly corresponded. In other letters sent to Castro and Velasquez, defendant referred to "Chavo." At one point, as instructed by "Señor Chavo" and with the assistance of "Bouncer of Colonia," defendant ran the "Southern Hispanics" section of the Lerdo jail facility. King and Sanchez testified the moniker "Chavo" belonged to Perez. Based on prior personal interactions, King knew Perez was a Mexican Mafia member and "the recognized leader of Kern County for all the Sure[ñ]os." Bravo and Sanchez testified they knew Ochoa was a Colonia Baker and had the moniker "Bouncer."[18] Malley opined defendant's role within the Lerdo jail facility demonstrated his influence and control over other Sureños; in other words, he was a "shot caller."

On May 20, 2013, defendant committed attempted murder, kidnapping, assault with a firearm, and unlawful firearm possession, all of which are primary activities of the Sureños, in the company of another Sureño (Ochoa). According to Malley, although defendant and Ochoa belonged to rival Sureño subsets, because they were housed together in a custodial setting, and therefore "expected and required to intermingle and associate with each other" and "get along together" by edict of the Mexican Mafia, they became "much more likely to commit crimes together." Moreover, defendant accused the victim (Miguel) of snitching on him and "big homies" in the Mexican Mafia. Finally,

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[18] In his reply brief, defendant concedes Ochoa was a validated Colonia Bakers gang member.

on August 6, 1997, defendant committed carjacking, another primary activity of the Sureños.

Because defendant's gang affiliation was amply established by other evidence, the erroneous admission of his responses to booking questions was harmless beyond a reasonable doubt. (*Elizalde*, *supra*, 61 Cal.4th at p. 542.)

b. *Preservation for appeal of the argument that Malley improperly related case-specific testimonial hearsay in violation of* Crawford *and* Sanchez.

The Attorney General claims defendant "did not object below on hearsay or confrontation clause grounds to the testimony he now disputes on appeal" and "[h]is failure to do so bars review of this claim." Defendant counters he preserved his argument for appeal by filing an appropriate motion in limine.

"[A] motion in limine to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context. When such a motion is made and denied, the issue is preserved for appeal." (*People v. Morris* (1991) 53 Cal.3d 152, 190, italics omitted, overruled in part by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

On February 25, 2015, defendant filed "In Limine Motion No. Five to Exclude/Limit Gang Evidence and Request for an Evidence Code Section 402 Hearing." (Boldface, underlining & some capitalization omitted.) It read:

> "[D]efendant . . . will move for an order excluding and/or limiting the testimony of any witnesses whom the prosecution intends to call at trial to testify as experts regarding the behavior and membership in street gangs and for an Evidence Code section 402 hearing so that the court might be in better position to limit the scope of the gang evidence.

> "This motion will be made on the ground that the value of such evidence is outweighed by its prejudicial effect, would exceed the permissible scope of expert testimony, and would deprive the defendant of a fair trial, the right to confront witnesses and due process as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution as well as the California Constitution, Article I, section(s) seven and fifteen."

In the accompanying "Memorandum of Points and Authorities" (boldface & some capitalization omitted), defendant made several arguments, including the following under the heading "Hearsay Basis Evidence and Evidence Code Section 352" (boldface & some capitalization omitted):

> "The admission of testimonial hearsay statements as basis evidence presents a particular risk of undue prejudice to the adverse party under Evidence Code section 352. By definition, testimonial statements are given and taken 'primarily for the purpose' of establishing 'some past fact for possible use in a criminal trial' and 'under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony.' (*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. omitted.) Testimonial statements are thus factually assertive statements which are difficult if not impossible to disregard for their truth. (See *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129-1131.) Testimonial statements are also of suspect reliability, particularly when the adverse party has not had an opportunity to cross-examine the declarant concerning the statement. (See *Crawford, supra*, 541 U.S. at pp. 61-62.)
>
> "Neither *People v. Gardeley* (1996) 14 Cal.4th 605 nor *People v. Thomas* (2005) 130 Cal.App.4th 1202 addressed whether the hearsay basis evidence in the cases before them was testimonial or should have been excluded or at least limited as basis evidence under Evidence Code section 352. And though *Hill* appropriately criticized the assumption underlying *Thomas* and *Gardeley*—that juries will be able to consider hearsay statements as basis evidence without regard for their truth or falsity—*Hill* also did not address the role of Evidence Code section 352 in limiting or excluding hearsay basis evidence.
>
> "The admissibility of any hearsay evidence as basis evidence should, when properly challenged, be analyzed under Evidence Code section 352 and limited or excluded to the extent necessary to prevent undue prejudice to the adverse party. Trial courts have long had discretion to limit or exclude any hearsay basis evidence, whether or not testimonial, under

Evidence Code section 352 when necessary to prevent undue prejudice to the adverse party, confusion of the issues, or misleading the jury.

"Courts of this state have consistently recognized that 'prejudice may arise if, " 'under the guise of reasons,' " the expert's detailed explanation " '[brings] before the jury incompetent hearsay evidence.' " ' (*People v. Montiel* (1993) 5 Cal.4th 877, 918; *People v. Catlin* (2001) 26 Cal.4th 81; *People v. Campos* (1995) 32 Cal.App.4th 304; *People v. Dean* (2009) 174 Cal.App.4th 186, 193.)"[19] (Italics omitted.)

The court granted defendant's request for hearings pursuant to Evidence Code section 402. At one such hearing, Malley testified he reviewed nine cases involving the commission of predicate offenses by members of different Sureño subsets. With respect to Malley's testimony, the court, in exercise of its discretion under Evidence Code section 352, allowed the prosecution to introduce six of the nine predicate offenses into evidence. (See *ante*, at pp. 26-27.)

In light of the content of the above-mentioned motion, we conclude defendant adequately preserved his argument that Malley improperly related case-specific testimonial hearsay in violation of *Crawford* and *Sanchez*. (Cf. *People v. Blessett* (2018) 22 Cal.App.5th 903, 921-922 [trial counsel's in limine motion to exclude prior crimes evidence was "generic in nature," was "not specific to the gang evidence," and "did not specifically reference the gang expert's anticipated testimony" or *Crawford*]; *People v. Blessett, supra,* at pp. 922-923 [trial counsel's in limine motion to exclude a gang expert's opinions on grounds of hearsay and lack of foundation "contained little 'hearsay' or 'foundation' analysis" "concerning expected gang expert testimony," "contained no confrontation clause analysis," and "did not specifically object to any aspect of the gang expert's anticipated testimony on *Crawford* grounds"].)

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19 Where appropriate, we reformatted the citations in the quoted text to conform to the general rules of citation outlined by the California Style Manual. (See generally Cal. Style Manual (4th ed. 2000).)

c. *Admission of Malley's testimony concerning the commission of two or more qualifying predicate offenses by gang members.*

i. California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.).

The California Street Terrorism Enforcement and Prevention Act "created a substantive offense, set forth in section 186.22, subdivision (a), and a sentencing enhancement, set forth in subdivision (b) of the statute." (*People v. Rios* (2013) 222 Cal.App.4th 542, 558 (*Rios*).)

Section 186.22, subdivision (a), punishes "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." " 'The elements of the gang participation offense . . . are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang.' [Citation.]" (*People v. Johnson* (2014) 229 Cal.App.4th 910, 920, fns. omitted.) Proof of the existence of a criminal street gang is a prerequisite. (See *Prunty, supra*, 62 Cal.4th at p. 67 ["To prove that a criminal street gang exists in accordance with [section 186.22], the prosecution must demonstrate that the gang satisfies the separate elements of the [California Street Terrorism Enforcement and Prevention] Act's definition . . . ."]; *People v. Lara* (2017) 9 Cal.App.5th 296, 337 (*Lara*) ["[W]ithout the improperly admitted testimonial hearsay regarding the missing predicate offense, the prosecution would not have proved every element of either the gang crime or the gang enhancement."].)

Section 186.22, subdivision (b)(1), imposes an enhancement on "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any

criminal conduct by gang members . . . ." "There are two prongs to the gang enhancement under section 186.22, subdivision (b)(1) . . . . The first prong requires proof that the underlying felony was 'gang related,' that is, the defendant committed the charged offense 'for the benefit of, at the direction of, or in association with any criminal street gang.' [Citations.] The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' [Citations.]" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948.) Again, proof of the existence of a criminal street gang is a prerequisite. (See *Prunty, supra,* 62 Cal.4th at p. 67; *Lara, supra,* 9 Cal.App.5th at p. 337.)

" 'To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]' [Citation.] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]' [Citation.]" (*Lara, supra,* 9 Cal.App.5th at pp. 326-327; accord, § 186.22, subds. (e), (f).)

To prove the elements of the gang participation offense and the gang enhancement, the prosecution may present expert testimony. (See, e.g., *People v. Franklin, supra,* 248 Cal.App.4th at p. 948; *People v. Williams* (2009) 170 Cal.App.4th 587, 609; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.)

ii. Expert testimony, hearsay, and the confrontation clause.

"While lay witnesses are allowed to testify only about matters within their personal knowledge [citation], expert witnesses are given greater latitude. 'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' [Citation.] An expert may express an opinion on 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citation.] In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. This latitude is a matter of practicality. . . . An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may usually be admitted to provide specialized context the jury will need to resolve an issue. When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." (*Sanchez, supra,* 63 Cal.4th at p. 675.)

In general, hearsay evidence, i.e., evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated, is inadmissible. (Evid. Code, § 1200.) However, "[t]he hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise. '[T]he common law recognized that experts frequently acquired their knowledge from hearsay, and that "to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on . . . impossible standards." Thus, the common law accepted that an expert's general knowledge often came from inadmissible evidence.' [Citations.] Knowledge in a specialized area is what differentiates the expert from a lay witness, and makes his

testimony uniquely valuable to the jury in explaining matters 'beyond the common experience of an ordinary juror.' [Citations.] As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Sanchez*, *supra*, 63 Cal.4th at p. 676; see *id.* at p. 685 ["Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code."].)

"By contrast, an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id.* at p. 686.)

"The admission of expert testimony is governed not only by state evidence law, but also by the Sixth Amendment's confrontation clause, which provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .' [Citation.]" (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) "Under previous United States Supreme Court precedent, the admission of hearsay did not violate the right to confrontation if it bore 'adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.' [Citation.] *Crawford* overturned . . . [this] rule. *Crawford* clarified that a mere showing of hearsay reliability was insufficient to satisfy the confrontation clause. 'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. . . . [¶] The [adequate indicia of reliability] test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.'

[Citation.] Under *Crawford*, if an exception was not recognized at the time of the Sixth Amendment's adoption [citation], admission of testimonial hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. [Citations.]" (*Id.* at p. 680.)

"In light of our hearsay rules and *Crawford*, a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is testimonial hearsay, as the high court defines that term." (*Sanchez, supra*, 63 Cal.4th at p. 680, italics omitted.) "Although the high court has not agreed on a definition of 'testimonial,' testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo* (2012) 55 Cal.4th 608, 619; see *Sanchez, supra*, at p. 689 ["Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony."].)

"Ordinarily, an improper admission of hearsay would constitute statutory error under the Evidence Code." (*Sanchez, supra*, 63 Cal.4th at p. 685.) We analyze prejudice of such an error under *Watson, supra*, 46 Cal.2d at page 836, which provides for reversal only when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." On the other hand, "[c]onfrontation clause violations are subject to federal harmless-error analysis under

Chapman . . . ." (*People v. Geier* (2007) 41 Cal.4th 555, 608; accord, *Sanchez*, *supra*, at p. 698.) "The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' " (*People v. Geier*, *supra*, 41 Cal.4th at p. 608.)

iii. Analysis.

In his supplemental brief, defendant contends:

> "A portion of Malley's testimony regarding background information about the Sure[ñ]o gang was admissible and is not at issue on appeal. . . . [¶] Malley properly testified about the general characteristics of the Sure[ñ]o gang, its primary activities, and its locations. The problem with his testimony arose when he crossed the line into relating testimonial hearsay to the jury. . . . [¶] . . . [¶] This crossing over into improper testimony occurred when Malley testified about the predicate offenses that were used to establish the requisite pattern of criminal activity for purposes of Section 186.22. . . ."

At trial, Malley identified six cases involving the commission of qualifying predicate offenses, including murder, assault with a deadly weapon, robbery, carjacking, grand theft, kidnapping, witness intimidation, and unlawful firearm possession, between August 6, 1997, and December 27, 2012. (See § 186.22, subd. (e).) He specified the perpetrators in those cases—defendant, Arnison, Cardenas, Casica, Epps, Escalera, Hurtado, Lemos, Ochoa, Richard, Rivera, Rodriguez, and Salas—were members of various Sureño subsets. Because Malley derived the details of the six cases solely from conversations with officers involved in the criminal investigations and/or their reports, he related case-specific testimonial hearsay. (See *Lara*, *supra*, 9 Cal.App.5th at p. 337 [gang expert testified from police reports generated by other officers during official investigations of predicate offenses].)[20]

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20 The Attorney General contends Malley's testimony establishing the commission of two or more qualifying predicate offenses by gang members was not case specific. We disagree. Testimony establishing a predicate offense, including a predicate offender's gang affiliation at the time of the offense, is case specific because the facts are beyond the scope of a gang expert's general knowledge. In *Sanchez*, the Supreme Court

Nonetheless, we conclude admission of Malley's testimony was harmless beyond a reasonable doubt. "The [two or more] predicate offenses must have been committed on separate occasions, or by two or more persons." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 (*Duran*), citing § 186.22, subd. (e); see *People v. Garcia* (2014) 224 Cal.App.4th 519, 524 ["Because section 186.22, subdivision (e) contains both the options of 'commission' or 'conviction,' the statute expressly does not require that the offense necessarily result in a conviction."].) Here, the evidence showed defendant was a member of the Loma Bakers subset. (See *ante*, at p. 48 & fn. 17.) In connection with the events of May 20, 2013, he was charged with attempted murder, kidnapping, assault with a semiautomatic firearm, and possession of a firearm by a felon, inter alia. Any of these offenses could serve as the first predicate offense. (See *Duran*, *supra*, at p. 1457 ["The charged crime may serve as a predicate offense."]; see also *People v. Ochoa*, *supra*, 7

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described case-specific facts as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) It provided the following example to distinguish case-specific facts from background information:

> "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Sanchez*, *supra*, 63 Cal.4th at p. 677.)

As noted, a gang's existence is a precondition of both the gang participation offense and the gang enhancement and predicate offenses are necessary to prove this existence. (See *ante*, at pp. 53-54.) Whether a specific crime actually occurred and was actually committed by a member of a particular gang is analogous to the presence of the diamond tattoo, not the explanation regarding its meaning, in *Sanchez*. (See *People v. Ochoa* (2017) 7 Cal.App.5th 575, 588-589 [likening predicate offender's gang-membership admission to the diamond tattoo example in *Sanchez*].) These facts, though not specific to defendant's conduct, are case specific. To hold otherwise would allow the prosecution to prove the existence of a gang through predicate offenses without any actual evidence in the record that the crimes were committed by actual gang members.

Cal.App.5th at p. 586 ["Because there was overwhelming evidence defendant was [a South Side Locos] member . . . , his [charged] offenses could qualify as predicate offenses for purposes of the enhancement."].) The evidence also showed Ochoa was a Colonia Baker. (See *ante*, at p. 49 & fn. 18.) In connection with the events of May 20, 2013, Ochoa was charged with attempted murder, kidnapping, assault with a semiautomatic firearm, assault with a firearm, and possession of a firearm by a felon, inter alia. (See *ante*, fn. 2.) Any of these offenses could serve as the second (and last) predicate offense. (See *Duran*, *supra*, at p. 1457 [predicate offense may be established by " 'proof of another offense committed on the same occasion by a fellow gang member' "]; see also *People v. Loeun* (1997) 17 Cal.4th 1, 11 ["[T]he prosecution can establish the requisite 'pattern' exclusively through evidence of crimes committed contemporaneously with the charged incident."].)[21,22]

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21 We point out the carjacking committed by defendant on August 6, 1997, cannot serve as a predicate offense because that occasion occurred more than three years before the events of May 20, 2013. (See § 186.22, subd. (e).)

22 We also reviewed the certified copies the "FELONY AMENDED COMPLAINT"/"FELONY AMENDED INFORMATION" and "REGISTER OF ACTIONS/DOCKET" for each the six cases. (See *ante*, at p. 27.)

The amended complaints/informations contained no information regarding the offenders' affiliation with Sureño subsets.

In the case involving Arnison, the docket indicated "counsel stipulate[d] . . . the Colonia Bakers is a criminal street gang in Bakersfield, Kern County, under . . . [section]186.22." (Some capitalization omitted.) Arnison pled nolo contendere to second-degree robbery and gang participation.

In the case involving Salas, the docket indicated "Salas [filed a] motion in limine . . . requir[ing] the prosecution to stipulate that the Varrio Bakers gang is a criminal street gang within the meaning of . . . [section] 186.22" and "counsel enter[ed] into a stipulation as stated on the record." (Some capitalization omitted.) Salas was convicted of murder, first-degree robbery, and gang participation. In addition, the jury found he committed the murder and robbery for the benefit of, at the direction of, or in association with a criminal street gang.

[*fn. cont'd on next page*]

d. *Evidence defendant and Ochoa belonged to the same gang.*

i. Standard of review. (See *ante*, at pp. 41-42.)

ii. Analysis.

"[W]here the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22[, subdivision](f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets. That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization." (*Prunty*, *supra*, 62 Cal.4th at p. 71, fn. omitted; see *id.* at pp. 76, 80-81 ["sameness" requirement].)

The record, viewed in the light most favorable to the judgment, establishes this associational or organizational connection. The prosecution theorized defendant actively participated in and committed the charged crimes for the benefit of, at the direction of, or in association with the Sureños criminal street gang. The qualifying predicate offenses involved two Sureño subsets in Kern County: the Loma Bakers (defendant's subset) and the Colonia Bakers (Ochoa's subset). (See *ante*, at pp. 59-60.) The evidence showed the Sureños are controlled by the Mexican Mafia prison gang. Perez, a Mexican Mafia member, is "the recognized leader of Kern County for all the Sure[ñ]os" and directly corresponded with defendant. Both gangs adhere to a rule against snitching and impose penalties such as beatings, stabbings, and even death. Sureños respect members and associates of the Mexican Mafia. Hence, while some of the Sureño subsets "feud with

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The dockets for the remaining cases contained no information regarding the offenders' affiliation with Sureño subsets.

each other" "out on the streets,"[23] including the Loma Bakers and the Colonia Bakers, at the behest of the Mexican Mafia, Sureños housed together in a custodial setting, regardless of subset, "are expected and required to intermingle and associate with each other" and "get along together." (See *Prunty*, *supra*, 62 Cal.4th at p. 77 ["[P]roof that different [gang] subsets are governed by the same 'bylaws' may suggest that they function—however informally—within a single hierarchical gang."]; see also *ibid.* ["[Gang] subsets may still be part of the same organization if they are controlled by the same locus or hub."].)

The evidence also showed defendant—per Perez's instructions—ran the Lerdo jail facility's "Southern Hispanics" section with Ochoa's assistance. This manifested not only compliance with the Mexican Mafia's "get along together" decree but also collaboration between members of different subsets to accomplish a shared objective. The partnership between defendant and Ochoa did not end after both were released from custody: on May 20, 2013, they kidnapped and attempted to murder Miguel for violating the rule against snitching. (See *Prunty*, *supra*, 62 Cal.4th at p. 78 ["[F]acts may suggest the existence of behavior reflecting such a degree of collaboration, unity of purpose, and shared activity to support a fact finder's reasonable conclusion that a single organization, association, or group is present. . . . For instance, the evidence may show that members of different subsets have 'work[ed] in concert to commit a crime.' "]; *ibid.* ["[P]roof that members of two gang subsets 'hang out together' and 'back up each other,' can help demonstrate that the subsets' members have exchanged strategic information or otherwise taken part in the kinds of common activities that imply the existence of a genuinely shared venture."].) We additionally highlight defendant's status as both a Loma Bakers member and a Mexican Mafia associate, the latter of which subsumes a Sureño

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23 "[T]here is no requirement that the subset gangs have peaceably coexisted for them to constitute a single organization." (*Prunty*, *supra*, 62 Cal.4th at p. 80.)

affiliation. (See *ibid.* [evidence a " 'liaison' " coordinated relations between the subsets "sufficient to show that the two subsets collaborate or cooperate"].)

Substantial evidence established defendant and Ochoa belonged to the same gang.

e. *Evidence of defendant's gang participation.*

i. Standard of review. (See *ante*, at pp. 41-42.)

ii. Analysis.

As noted, gang participation requires proof of a defendant's active participation in a criminal street gang; knowledge of members' engagement in a pattern of criminal activity; and willful promotion, furtherance, or assistance in any felonious criminal conduct by members. (See *ante*, at pp. 53-54; see *People v. Johnson*, *supra*, 229 Cal.App.4th at p. 920 ["Section 186.22, subdivision (a), 'requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member.' "].) The record, viewed in the light most favorable to the judgment, shows defendant is an active Sureño. During his previous incarceration, he "got schooled by the older generation" of Sureños and "became close" with many Sureños. Defendant directly corresponded with Perez, the leader of the Sureños in Kern County. At one point, as instructed by Perez, defendant ran the "Southern Hispanics" section of the Lerdo jail facility with the assistance of Ochoa, a fellow Sureño. On May 20, 2013, defendant and Ochoa kidnapped and attempted to murder Miguel, a former Mexican Mafia and Sureño member, for violating the gang's rule against snitching. After defendant was taken into custody, he communicated with Gerald, his uncle and a Sureño, about Miguel's whereabouts and how to prevent him from appearing in court. In subsequent correspondences to Perez and Castro, a Mexican Mafia member, defendant recounted the events of May 20, 2013, i.e., he encountered "old ho Mike[i]o" "on the calles" and "gave her a ride to the cemetery." Moreover, a reasonable fact finder could infer from defendant's conduct that defendant knew of members' engagement in a pattern of criminal activity and willfully promoted, furthered, or assisted in the felonious

criminal conduct on May 20, 2013. (See *Rios*, *supra*, 222 Cal.App.4th at p. 568 [" 'Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' "].) Substantial evidence supported defendant's conviction for gang participation.

f. *Evidence of the gang enhancement findings.*

i. Standard of review. (See *ante*, at pp. 41-42.)

ii. Analysis.

As noted, the gang enhancement requires proof a defendant committed the underlying felony for the benefit of, at the direction of, or in association with a criminal street gang and did so with the specific intent to promote, further, or assist in any criminal conduct by gang members. (See *ante*, at pp. 53-54.) The record, viewed in the light most favorable to the judgment, shows defendant and Ochoa publicly kidnapped Miguel at gunpoint. Defendant then drove away from the residential zone and accused Miguel of snitching on "big homies" in the Mexican Mafia. At least 15 minutes later, when the car stopped at the Mount Vernon Avenue/Alfred Harrell Highway-Panorama Drive intersection, but before it could proceed to a more remote location, Miguel tried to escape and defendant shot him in the back. Malley opined defendant's and Ochoa's conduct benefitted the Sureños. First, abducting Miguel in such an ostentatious manner instilled fear into the community at large, which discouraged cooperation with law enforcement and enhanced the gang's level of respect. Second, had Miguel been killed, defendant and Ochoa would have "silence[d] a source of police information" and "take[n] an informant out of the picture." Furthermore, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 68; see *Rios*, *supra*, 222 Cal.App.4th at pp. 567-568 [" '[I]ntent is rarely susceptible of direct proof and

usually must be inferred from the facts and circumstances surrounding the offense.' "].) Substantial evidence supported the jury's gang enhancement findings.

DISPOSITION

The judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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HILL, P.J.

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FRANSON, J.